IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Criminal Appeal No.932/2003

Ram Singh S/o Shri Badrilal
...Accused-Appellant
Versus
The State of Rajasthan through
Public Prosecutor
...Respondent

Date of Judgment :::: 7th March, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri V.S. Chauhan, Counsel for accused-appellant
Shri Arun Sharma, P.P., for the State
####

By the Court:-

Accused Ram Singh S/o Shri Badrilal has preferred this criminal appeal under Section 374 (2) of the Code of Criminal Procedure, challenging his conviction and sentence passed by the Additional Sessions Judge (Fast Track), Tonk, vide its judgment and order dated 10.4.2003, in Sessions Case No.92/2002, whereby he was convicted and sentenced under section 376, IPC, to seven years rigorous imprisonment and a fine of Rs.100/-, in default of payment of fine, to further undergo three months simple imprisonment; and under Section 366, IPC, to

three years rigorous imprisonment and a fine of Rs.100/-, in default of payment of fine, to further undergo three months simple imprisonment.

The learned counsel for the accused-appellant initially argued that finding of trial court about age of the prosecutrix i.e. less than 16 years, is illegal in view of medical report (Exhibit P-9) and statement of PW-13 Dr. P.D. Sharma, which state her age to be 17 to 19 years and, in case the age of prosecutrix is determined as above 16 years, then accused is liable to be acquitted even as per finding of the trial court to the effect that prosecutrix herself was a consenting party to the sexual intercourse. However, keeping in view the statement of the prosecutrix PW-10 Reshma before the trial court and the documentary evidence (Exhibit P-20 and Exhibit P-21) in respect of date of birth of the prosecutrix wherein her date of birth is mentioned as 6.1.1987, meaning thereby she was aged 15 years and 3 months on the date of the occurrence, the learned counsel for the appellant did not challenge the finding of the trial court during the course of arguments of the appeal and confined his arguments only in respect of reduction of sentence of imprisonment awarded by the trial court. He

contended that the accused-appellant is in jail since 29.6.2002, therefore, he has already undergone the sentence of imprisonment of 4 year 8 month and 9 days, therefore, the sentence of imprisonment awarded by the trial court may be reduced to a period of imprisonment already undergone by him. He contended that there are adequate and special reasons in the present case for reducing the sentence of imprisonment of the accused-appellant, as the prosecutrix herself, in her statement before the investigating agency under Section 161, Cr.P.C., stated that she herself told the accused Ram Singh to meet her because she was annoyed with her father for the reason that her father used to commit sexual intercourse with her and she herself went with the accused. A copy of the above referred statement was placed on the record by defence as Exhibit D-4. He also contended that Reshma herself lived with accused for more than two months voluntarily and she became pregnant and her pregnancy of two months was also got terminated and further she, in her statement recorded before the Judicial Magistrate under Section 164 Cr.P.C. (Exhibit P-14), admitted that she herself went with the accused, who had consented sexual intercourse with her and for this she was not forced by the accused. However, she

improved her statement before the trial court and the trial court itself acquitted other two accused-persons, namely, Kishan Singh and Ram Bux on the ground that there is an improvement in her statement before the trial court, whereas on the same set of evidence accused has been convicted, therefore, he contended that looking to all these special and adequate reasons the sentence of imprisonment awarded by the trial court be reduced to a period of sentence of imprisonment already undergone by him.

The learned Public Prosecutor contended that as per the finding of the learned trial court the age of the prosecutrix, on the date of occurrence, was less than 16 years, therefore, consent of prosecutrix in respect of these crimes becomes irrelevant and the appeal of the accused-appellant is liable to be dismissed.

I have considered the submissions of the learned counsel for both the parties and examined the impugned judgment as well as the record of the trial court.

Exhibit P-1, a typed-report, was lodged by PW-1 Ladu Lal, the father of the prosecutrix Reshma

wherein it was alleged that his daughter Reshma, aged about 15 years and student of 9th class, has been abducted by accused Ram Singh, Ram Bux and other two-three persons on 6.4.2002. On the basis of this report, an FIR No.97/2002 (Exhibit P-2) was registered under Sections 363 and 366, IPC. Reshma was recovered from the house of Mangi Lal Sharma (PW-15) on 28.6.2002 and thereafter her statement under Section 161 Cr.P.C. was recorded, which was placed on the record as Exhibit D-4, wherein she stated that she herself told accused Ram Singh to meet her at about 12'O Clock on 6.4.2002 at Panwaad as she is very much perturbed from the act of her father. She also specifically stated in her statement that her father committed forcible sexual intercourse with her twice. Her statement was also recorded before the Judicial Magistrate, 1st Class, Tonk, under Section 164, Cr.P.C., on 6.7.2002, wherein she specifically stated that she herself went with accused on 6.4.2002 and accused had a consented sexual intercourse with her and she was not forced by him. The prosecutrix was medically examined on 29.6.2002 wherein the Medical Board gave the following opinion:-

(1)She is accustomed of sexual

penetration;

(2) There is no evidence of forceful penetration;

(3) Opinion regarding second sexual intercourse will be given after receiving FSL chemical analysis report of sample taken for presence of human semen and spermatozoa.

(4) Opinion regarding age will be given after X-ray report.

Final opinion - After chemical and We the members of Medical Board are of the opinion that Age of Reshma is between 17 to 19 years (Above 17 years and below 19 years).

The application form for admission in School and the students admission register (Exhibit P-20 and Exhibit P-21) were produced wherein the date of birth of Reshma was mentioned as 6.1.1987, meaning thereby on the date of occurrence her age was 15 years and 3 months. The learned trial court, after considering the oral and documentary evidence on the record, recorded a finding that her age was less than 16 years. The trial court also recorded a finding that there was no forcible sexual intercourse committed by any of the accused but it was a consented sexual intercourse. However, in view

of the fact that she was less than 16 years of age, the trial court convicted and sentenced the accused under Sections 366 and 376, IPC, as mentioned above.

So far as finding of the trial court in respect of conviction of the accused under Sections 366 and 376, IPC, is concerned, the learned counsel for the appellant did not press the appeal on merits in view of date of birth of Reshma mentioned in Exhibit-P-20 and Exhibit-P-21 and as per her statement recorded by the trial court.

I have also examined her statement recorded before the trial court wherein she has specifically alleged that the accused persons abducted her and committed forcible sexual intercourse with her and further that she gave her statement under Sections 161 and 164, Cr.P.C. under threat of the accused. The documents Exhibit P-20 and Exhibit P-21 are proved and trial court rightly recorded a finding that age of the prosecutrix was less than 16 years, therefore, I find that the learned counsel for the appellant was right in not pressing the appeal on merits, therefore, the other facts of the case and prosecution evidence is not required to be discussed in detail and I uphold the finding of the trial

court so far as conviction of accused under Sections 366 and 376 IPC is concerned.

So far the arguments of the learned counsel for the accused-appellant regarding reduction of sentence of imprisonment of the accused is concerned, I find that the prosecutrix herself in her statement before the police under Section 161 Cr.P.C. (Exhibit D-4) stated that she herself went with accused Ram Singh as she was very much perturbed from the act of her father as her father committed forcible sexual intercourse with her twice and she was very much annoyed with him. Reshma (PW-10) in her statement under Section 164, Cr.P.C. (Exhibit D-4) also admitted before the Judicial Magistrate that she herself went with accused and sexual intercourse with her by accused took place with her consent and there was no forcible sexual intercourse committed by the accused. Although, as per the documentary evidence on the record, the prosecutrix appears to be 15 years and 3 months of age on the date of occurrence i.e. less than 18 years but the medical-report of the prosecutrix (Exhibit P-9) reveals that the Medical Board consisting of three Doctors opined that her age was above 17 years and below 19 years. There is

consistent view that there may be flexibility of three years while determining the age of the prosecutrix on the basis of the medical-report, therefore, her age could have been determined even up-to 19+3 = 22 years. The medical-report (Exhibit P-9) further shows that there was no evidence of forcible penetration and she was accustomed of sexual intercourse. The trial court itself has recorded a finding that there was no forcible sexual intercourse committed with her and it was a case of free consent on the part of the prosecutrix. Therefore, looking to all the facts and circumstances of the case, I find this case to be a fit one to reduce the sentence of imprisonment of the accused-appellant.

In Prem Chand Vs. State of Haryana, AIR 1989 SC 937, in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court reduced the sentence of imprisonment of ten years awarded under Section 376 (2) IPC, to a period of sentence of imprisonment of five years. The State of Haryana filed review petition before Hon'ble the Supreme Court in the above case and the same was dismissed. The decision of the Hon'ble Supreme Court in that review petition is reported in

(1990) 1 SCC 249 (State of Haryana v. Prem Chand & Others).

In Ram Kumar Vs. State of Haryana (2006) 4 SCC 347, their Lordships of the Hon'ble Apex Court reduced the sentence of seven years under Section 376, IPC, to a period of three years imprisonment. Para No.3 of the judgment reads as under:-

> "3. The appellant, aggrieved by the order passed by the High Court has filed the above appeal by way of appeal. We have been taken through the statement and evidence recorded by the Court. Our attention was also drawn to the judgment passed by both the Sessions Court as well as the judgment passed by the High Court. The learned counsel for the appellant drew our attention to the statement of the girl Bimla (PW-5) and also drew our attention to the evidence of the doctor. We have carefully analysed the evidence tendered by the prosecution. In our opinion, sufficient evidence was tendered by the prosecution to prove the guilt of the accused. However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and

> circumstances of the case, we are of the view that the sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the highside. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

In the case of State of Chhattisgarh Vs. Lekhram, (2006) 5 SCC 736, the Hon'ble Apex Court reduced the minimum sentence under Section 376, IPC, of seven years to a sentence of one-and-half-year imprisonment, already undergone by accused therein. Para 16 of the judgment reads as under:-

> "16. The prosecutrix was a mature girl. She was married. She spent a few months in her in-laws' place. The respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the custody of her guardian by the respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the respondent again may not arise. She lived for some time with the respondent in a rented house. Both the courts proceeded on the basis that

> she was a consenting party. The occurrence took place in the year 1986. The respondent preferred an appeal before the High Court in the year 1987. The same remained pending for about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one-and-a-half years. In the peculiar facts and circumstances of this case and having regard to the facts that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to send the appellant back to prison."

Under sub-section (1) of Section 376 IPC the minimum sentence of seven years is prescribed but it is subject to proviso that the court may, for adequate and special reasons, impose a sentence of imprisonment for a term of less than seven years.

In the peculiar facts and circumstances of the present case, as discussed above, I think it fit and proper to invoke the proviso of sub-section (1) of Section 376, IPC, and, in my opinion, ends of justice will meet in case the sentence of

imprisonment awarded against the accused-appellant Ram Singh by the trial court under Section 376, IPC, is reduced to a period of imprisonment of five years.

Consequently, the appeal of accused-appellant Ram Singh is partly allowed. His conviction and sentence under Section 366 IPC is maintained, but while maintaining the conviction under Section 376, IPC, his sentence of imprisonment under this Section is reduced to a period of five years rigorous imprisonment.

(Narendra Kumar Jain) J.

//Jaiman//